Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Petition of Verizon Telephone Companies	)	WC 04-440
for Forbearance Under 47 U.S.C. § 160(c)	)	
from Title II and *Computer Inquiry* Rules	)	
with Respect to Their Broadband Services	)	

OPPOSITION OF MCI, INC.

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EXECUTIVE SUMMARY

MCI strongly opposes Verizon's request for forbearance from *Computer Inquiry* and Title II regulations that apply to any of its broadband services. Completely deregulating the incumbent LECs' broadband services, particularly the requirements that they tariff and unbundle the telecommunications transport functionality used to provide information services, would be unwise policy because it would harm competition in the information services market.

In its "me too" forbearance petition, Verizon adds nothing new to the debate. Despite its claims, the market for broadband services and facilities is not fully competitive. Although Verizon claims that the broadband market is intensely competitive, it fails to demonstrate this in its Petition. Instead, Verizon focuses on the retail and, to a lesser extent, the business markets for retail Internet access services. The appropriate focus, however, should be on the wholesale market for Verizon's underlying transmission facilities, where there is little to no competition. While end users do have an alternative to the incumbents' high-speed broadband services, this is not true for ISPs. Unaffiliated ISPs largely depend on the incumbent LECs' broadband transmission facilities to provide high-speed Internet access. Verizon gives short shrift to this segment of the broadband market, quoting a Commission order that presumed that competition would give the incumbent LECs incentives to do business with wholesale customers in order to retain or increase market share. There is no evidence, however, that this assumption is true. Once freed from common carrier regulations, Verizon could try to restrict competitors' access to end users, effectively preventing end users from enjoying applications or content from specific providers. Absent the protections provided by Title

II and *Computer Inquiry* requirements, particularly the tariffing and unbundling requirements end users and independent ISPs will be vulnerable to anticompetitive behavior by Verizon.

Finally, like the other BOCs' forbearance petitions, Verizon's request for forbearance is an effort to force the Commission's hand to exempt Verizon from paying into the universal service fund before the Commission has fully vetted the issues surrounding the appropriate universal service contribution obligations for wireline broadband services. Among other things, grant of Verizon's Petition would apparently further reduce the already-declining universal service contribution base and would shift contribution obligations for other services.

As the Commission considers this and other BOC petitions for forbearance from regulation of key regulations of broadband services and transmission facilities, the Commission should conduct its analysis through what has been called a "layers approach." MCI believes that this is the most appropriate policy framework, an approach that distinguishes between the physical layer, where bottlenecks still exist, and the application and content layers, where Internet access exists, that are subject to competition and market discipline. As long as carriers that own underlying bottlenecks transmission facilities because there are no competitive alternatives available, the Commission should maintain regulation of such carriers.

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Petition of Verizon Telephone Companies	)	WC 04-440
for Forbearance Under 47 U.S.C. § 160(c)	)	
from Application of *Computer Inquiry*	)	
and Title II Common Carriage	)	
Requirements	)	

OPPOSITION OF MCI, INC.

MCI, Inc. (MCI), by its attorneys, hereby submits its comments in opposition to the Petition for Forbearance filed by the Verizon Telephone Companies ("Verizon") in the above-captioned proceeding.[1] Verizon's broadband services, particularly its underlying transmission facilities, should remain subject to *Computer Inquiry* and Title II requirements. The broadband market with respect to wholesale services for transmission facilities is not competitive. As a result, information service providers ("ISPs") have no alternatives to the incumbent LEC network.

I. THE COMMISSION SHOULD NOT FORBEAR FROM ENFORCING *COMPUTER INQUIRY* REQUIREMENTS

According to Verizon, today's broadband market is sufficiently competitive to warrant forbearance of key common carrier obligations.[2] This ignores the important role the Commission's rules have played in fostering a competitive Internet as well as the existing need for continued regulation of bottleneck facilities. The thrust of the

[1] Petition of Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Application of *Computer Inquiry* Rules with Respect to Their Broadband Services, WC 04-440, (filed December 20, 2004) ("Petition").

[2] *Id*. at 18.

Computer Inquiry proceeding was that bottleneck transmission facilities need to be shared in order for there to be a competitive information services market. As long as the underlying transmission was made available on a common carrier basis, any and all communications services could develop and prosper in an unregulated marketplace. In 1996, Congress later adopted this scheme in amending the Communications Act of 1934, maintaining the premise that deregulation of communications markets is possible only with regulation of bottleneck telecommunications facilities.

The importance of protecting enhanced service providers from abuse of market power by companies that control bottleneck transmission facilities is no less important now than when the *Computer Inquiry* rules were first adopted. Contrary to Verizon's claims, today, the incumbent LEC's last-mile facilities are still the primary means for independent information service providers (ISPs) to access their customers. As long as carriers that own the broadband transmission facilities can exercise market power because transmission is not yet available on a competitive basis, they will exercise that market power by controlling downstream markets that depend on those transmission services.

Absent *Computer Inquiry* unbundling requirements, there will be far fewer alternatives for ISPs to obtain access to their customers. A firm like Verizon, that possesses market power over physical access to the network, has both the incentive and the ability to restrict competitors' access to end users, effectively preventing end users from enjoying applications or content from specific providers. Left unchecked, Verizon could provide an unfair advantage to its affiliated ISP by restricting the ability of non-affiliated ISPs to provide broadband Internet access to end users. The *Computer Inquiry*

unbundling and tariffing requirements were intended to prevent this type of discriminatory and anticompetitive behavior.[3] The future development of the Internet hinges on the Commission's continuing its policy of imposing economic regulation on bottleneck facilities – a policy that has allowed the Internet to experience the remarkable growth it has thus far enjoyed. It is by virtue of the *Computer Inquiry* rules that incumbent LECs are required to provide basic telecommunications connections to ISPs on a nondiscriminatory basis.

Verizon is anxious to remove *Computer Inquiry's* to unbundle and tariff its enhanced services. This would be unwise policy because it would harm competition in the information services market. Essentially, the tariffing and cost support requirements are part of a regime of dominant carrier regulation designed to, among other things, promote a competitive information services broadband marketplace. The importance of protecting ISPs from abuse by companies with market power is no less important today than when these requirements were first imposed. In particular, the notice and cost support requirements provide incumbent LEC competitors the opportunity to analyze and challenge proposed incumbent LEC tariffs.[4] Competitive LECs, ISPs and other interested parties can petition the Commission to suspend and investigate tariffs that propose rates, terms and conditions that are viewed as unjust, unreasonable and/or, discriminatory in nature. Required cost support enables parties to examine the underlying justification for proposed rate changes.

[3] *See e.g., MCI v. AT&T*, 512 U.S. 218 (1994) (holding that tariff requirements were intended as a critical means to prevent unreasonably discriminatory charges).
[4] 47 C.F.R. §§ 61.58, 61.38.

As the Commission considers the numerous pending forbearance petitions, it should analyze the requests through what has been called a "layers approach,"[5] which is consistent with the rationale behind the *Computer Inquiry* requirements. In particular, the Commission should distinguish between the physical layer, where bottlenecks still exist, and the application and content layers, including Internet access service, that are subject to competition and market discipline. A distinction between the physical layer and the content and applications provided over lower layers is consistent with the enhanced/basic and information service/telecommunications service distinctions that have served the Commission well for over 20 years.

Despite Verizon's attempt to minimize the significant risk that a company with market power in one layer can act to impede competition in other layers, the Commission has long recognized the need to safeguard against the potential for a carrier with market power in an upstream market to leverage its power to harm competition in a downstream market.[6] Specifically, a firm that possesses market power over physical access to the network has both the incentive and the ability to restrict competitors' access to end users, effectively preventing end users from enjoying applications or content from specific providers. It is this issue in particular that Verizon ignores.

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[5] MCI has proposed that the Commission adopt a simplified layers model consisting of four layers: A content layer; an application layer; a logical layer; and a physical layer consisting of both transport (*e.g.*, point of presence ("POP")-to-POP connections) and access (*e.g.*, last-mile connections between end users and central offices or POPs). Richard S. Whitt, Senior Director for Global Policy and Planning, MCI, "A Horizontal Leap Forward: Formulating a New Public Policy Framework Based on the Network Layers Model (December 2003).

[6] *See, e.g.*, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756 (1997) ("*LEC Classification Order*"); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C.2d ¶ 229 (1980) *(Computer Inquiry)*.

As the Commission moves forward, it should not lose sight of the basic market power concerns that are the impetus for much of the Commission's current dominant carrier regulation. Under a layers approach, economic regulation is critical to ensure that companies with market power in the physical layer, including wholesale DSL services, cannot act anticompetitively to impede competition in the applications and content layers, which depend on access to the broadband platform. Economic regulation should remain in place as long as it is necessary to constrain Verizon and other dominant carriers from exercising their market power in one segment, or layer, in a manner that undermines competition in others. It is this kind of targeted approach to regulation, as embodied in *Computer Inquiry*, that has led to the openness, innovation and extraordinary growth that characterize the Internet today.

II. COMPETITION IS INSUFFICIENT TO ENSURE THAT RATES ARE JUST, REASONABLE AND NONDISCRIMINATORY

In order to satisfy the requirements for forbearance under section 10(a) of the Act, Verizon must demonstrate that Title II regulation of its broadband transmission facilities: (1) is not necessary to ensure that the charges and practices for such services "are just and reasonable and are not unjustly or unreasonably discriminatory;" (2) is not necessary "for the protection of consumers;" and (3) is not necessary to protect the public interest.[7] The Commission must deny Verizon's Petition if it finds that "any one of the three prongs is unsatisfied."[8] In considering whether forbearance is consistent with the public interest,

[7] 47 U.S.C. § 160(a).

[8] *CTIA v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

the Commission must focus on whether forbearance from Title II would promote competitive conditions in the marketplace.[9]

Verizon has not even attempted to show that marketplace forces within its region would be adequate to constrain its market power and ensure that rates and practices are just, reasonable, and not unreasonably discriminatory; that consumers are protected; and that forbearance would be in the public interest.

A. Verizon Retains Market Power in the Broadband Market

A proper finding of competition sufficient to warrant forbearance requires more than Verizon has put forth here. Verizon paints with a broad brush when it claims that the broadband market is intensely competitive. As an initial matter, Verizon must first define the relevant product market. There are two distinct markets that should be addressed here, the retail broadband market, in which end user customers are served by ISPs, and the wholesale broadband transmission market, in which ISPs take service from incumbent LECs, competitive LECs and, to a very limited extent, cable companies. Second, Verizon has failed to define the relevant geographic scope of the market, which the Commission dictates would be local.[10] The presence or absence of competition in one locality, therefore, bears no relation to the presence or absence of competition in another locality. The closest that Verizon comes to demonstrating competitive conditions in its local markets is its claim that "in the top 25 MSAs, on average, 92% of the population has access to cable modem service."[11] Based on the limited facts presented in

[9] 47 U.S.C. § 160(b).

[10] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, 16 FCC Rcd 6547, ¶ 74 (2001).

[11] Petition at 5. This is not to say that 92% of the Verizon's customers in these MSAs also have access to xDSL or other Internet access services.

the Petition, however, the Commission cannot conclude that the broadband market faced by end users *and* ISPs is sufficiently competitive throughout Verizon's entire service territory.

Verizon's depiction of cable modem service as dominant in the broadband market is exaggerated. At best, Verizon's Petition has shown that, as a general matter, cable modem service is the main competitor to xDSL service for retail broadband services.[12] The alternative services offered by wireless, satellite and energy companies do nothing to bolster Verizon's claim of significant, intense intermodal competition. Broadband over power lines has yet to enter the market on a commercial basis. As for wireless and satellite broadband services, wireless and satellite providers are not significant players in the broadband market. Together, these entities comprise only 1.3% of the market.[13] In reality, Verizon's claim that competition can ensure that charges are just, reasonable and nondiscriminatory is misleading. Two companies in a market are not enough to generate serious price competition and innovation.[14]

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[12] *Id*. at 4-6, 16-19.

[13] FCC High Speed Report, Dec. 2004, Tables 1-4.

[14] Even if Verizon could demonstrate that cable modem service is prevalent throughout its territory as an alternative to xDSL, that would still not constitute a competitive retail broadband market. That would be a duopoly, in which Verizon would still maintain substantial market power. The Commission has consistently embraced the uniformly held view among economists that duopoly markets are insufficiently competitive because of the ever-present risk of tacit collusion: that the duopolists will recognize their shared economic interest with respect to price and output decisions and will act, albeit implicitly, so as to achieve supracompetitive profits. *See* Xavier Vives, *Oligopoly Pricing, Old Ideas and New Tools* at 6 (1999) (explaining tacit collusion theory); Edward Hastings Chamberlin, *The Theory of Monopolistic Competition: A Re-orientation of the Theory of Value* 46-55 (8th ed. 1962) (explaining that in a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger). Also known as "spontaneous coordination," or "conscious parallelism," the concept of tacit collusion means that duopolists do not need to expressly collude in order to act so as to jointly attain supracompetitive profits. Rather, they have incentives to act interdependently. Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law With Oligopoly Theory,* Antitrust Law Journal 719, 726, 764 (2004)

If there is little competition in the retail broadband market, the status of competition in the wholesale broadband market is even more restricted. There is little to no competition in the market for underlying transmission facilities for independent ISPs. As MCI discussed in greater detail in response to BellSouth's forbearance petition,[15] the incumbent LEC's last-mile facilities are still the primary means for independent ISPs to access their customers. There are no third parties offering alternative narrowband or broadband transmission facilities.[16] Competitive LECs that provide underlying transmission facilities are in turn dependent upon incumbent LEC facilities. And, with the Commission eliminating line sharing and phasing out the unbundled network element platform, competitive LECs are not a viable long-term option for independent ISPs. The final nail in the proverbial coffin is the Commission's decision to permit incumbent LECs to cut off competitive LEC access to xDSL to subscribers whose homes are overbuilt with fiber-to-the-home.[17]

Cable modem systems are not a sufficient alternative for ISPs for several reasons. First, because cable companies target their build-outs to residential areas, rarely is their service available to business customers. Second, cable companies are not required to provide access to their networks on a wholesale basis to competitive LECs or ISPs. The

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(internal citations omitted). Indeed, "from an economic point of view, explicit and tacit collusion are not fundamentally different," that is, they present the same problem of anti-competitive effects. Louis Philips, *Competition Policy: A Game Theoretic Perspective* 94 (1996).

[15] *See*, Opposition of MCI, Inc., WC 04-405 at 1-11 (filed Dec. 20, 2004).

[16] *Report and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 233 (2003) (subsequent history omitted).

[17] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Comm. Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications Int'l, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Tel., Inc. Petition for Forbearance Under 47 U.S.C. § 160(c),* 19 FCC Rcd 21,496 (2004) ("*BOC Forbearance Order*").

Commission has declined to require cable companies to provide a wholesale broadband transmission services that ISPs can use to serve their end users.[18] At most, ISPs may be able to negotiate a commercial agreement to partner with the cable company under a private carriage arrangement. This is a far cry from ensuring that ISPs are able to obtain access on a just, reasonable and nondiscriminatory basis.

In its Petition, Verizon did not, and cannot, demonstrate that wireline alternatives exist for ISPs such that deregulation of incumbent LEC facilities is justified at this time. Incumbent LECs do indeed continue to have bottleneck control over the network used to provide broadband data services. The level of competition that exists in the broadband market is insufficient to constrain Verizon and other incumbent LECs from engaging in anticompetitive behavior. As a result, the Commission should re-affirm its conclusion that "enhanced service providers remain dependent on ILECs for local access to their customers" since it "recognizes that ILECs may be able to leverage control over their local exchange facilities into market power over new or existing services."[19]

B. Verizon's Petition Fails to Satisfy Section 10(a)

The Commission may grant forbearance only if it concludes that marketplace forces are sufficiently well-established to prevent unjust, unreasonable and unreasonably discriminatory practices, and to protect consumers.[20] Section 10(a) requires the Commission to focus on whether the statutory provision or regulation to be eliminated is necessary to prevent a carrier from exercising market power by, for example, charging

[18] *Inquiry Concerning High-Speed Access to the Internet over Cable and other Facilities; Internet over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶ 43 (2002) ("*Cable Modem Order*").

[19] *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 16 F.C.C.R. 7418, ¶ 58 n.237 (2001) (*CPE/Enhanced services Bundling Order*").

[20] 47 U.S.C. § 160(a).

excessive rates or engaging in unlawful discrimination. The Commission is instructed to consider whether forbearance "will promote competitive market conditions."[21] Not once in the Petition does Verizon allege specific facts that demonstrate that its forbearance request satisfies any of the three prongs of section 10(a).

Competition is the most effective means of ensuring that the charges and practices associated with telecommunications services are just, reasonable and nondiscriminatory.[22] As explained above, however, Verizon and other incumbent LECs continue to exercise market power over last-mile facilities that ISPs use to connect consumers to the Internet and to provide IP-based content and applications. Despite the growth of services that permit end users to obtain broadband Internet access services from cable providers, incumbent LECs retain the ability and incentive to use their market power in the provision of wholesale mass market broadband transport services, such as DSL, to harm competition in the information services market.

MCI's position is consistent with Commission policy. Where a carrier possesses market power over bottleneck facilities or services, the Commission has either declined to grant forbearance, or conditioned forbearance on continued non-discriminatory access to those critical inputs. For example, in the context of a request for forbearance from the separate affiliate requirements for nonlocal directory assistance, the FCC concluded that the BOCs continued to benefit from competitive advantages stemming from their position as the dominant providers in the local exchange and exchange access markets. [23] As a

[21] 47 U.S.C. § 160(b).

[22] Petition at 19.

[23] *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, Memorandum Opinion and Order, 14 FCC Rcd 16252, ¶ 35 (1999) ("*USWC NDA Order*") (finding that because of their market power, the BOCs had "access to a more complete, accurate, and reliable [directory

result, the Commission conditioned its grant of forbearance on continued compliance "with the nondiscrimination requirements set forth in section 272 with respect to the in-region telephone numbers "that the BOCs] use[] in the provision of nonlocal directory assistance service."[24] Absent non-discriminatory access to those listings, the FCC found that none of the requirements of section 10(a) could be met.[25]

In the broadband market, forbearance would mean that the incumbent LECs would have both the incentive and the ability to withhold DSL services from non-affiliated ISPs or to provide DSL services to non-affiliated ISPs on unreasonable and discriminatory prices, terms and conditions. In the absence of Title II's tariffing requirements, Verizon could charge significantly above-cost prices for wholesale DSL service in order to subject non-affiliated ISPs to a price squeeze. Verizon's affiliated ISP could absorb the increased cost and continue to offer a competitively priced Internet access product. Non-affiliated ISPs, however, would little choice but to pass the higher DSL costs on to their end users. This would of course, result in a loss of customers to the lower-priced services of Verizon's affiliated ISPs. Ultimately, Verizon and other LECs

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assistance] database than [their] competitors."); *Verizon Petition for Forbearance for Nonlocal Directory Assistance Service; Petition of SBC Communications Inc. for Forbearance of Structural Separation Requirements and Request for Immediate Interim Relief in Relation to the Provision of Nonlocal Directory Assistance Services; Petition of Bell Atlantic for Further Forbearance from Section 272 Requirements in Connection with National Directory Assistance Services*, Memorandum Opinion and Order, 15 FCC Rcd 6053, ¶ 15 n.42 (2000) ("*BOC NDA Order*").

[24] *BOC NDA Order* ¶ 15 n.42; *USWC NDA Order* ¶¶ 35-37; *see also Bell Operating Companies; Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934*, Memorandum Opinion and Order, 13 FCC Rcd 2627 (Com. Car. Bur. 1998) (conditioning forbearance on continued access by unaffiliated entities to listings used to provide E911 and reverse directory services).

[25] *See USWC NDA Order* ¶¶ 35-37, 46-47, 53 (relying on continued non-discriminatory access to in-region directory listings to find that enforcement of the separate affiliate safeguards of section 272 was not necessary).

could substantially reduce, or eliminate completely, non-affiliated ISPs in the Internet access market.

Verizon seeks to compensate for its failure to adequately address the requirements of section 10(a) by relying on section 706 of the Act.[26] However, while the Commission can consider the costs versus the benefits of regulation (including promotion of section 706's goals) as part of its public interest inquiry under section 10(a)(3), the results of such a cost-benefit analysis are relevant only to the Commission's analysis of section 10(a)(3). Since "the three prongs of § 10(a) are conjunctive,"[27] public interest considerations pursuant to section 10(a)(3) cannot obviate the need for the findings required by sections 10(a)(1) and (a)(2). In other words, even if section 706 somehow supported Verizon's public interest claim under section 10(a)(3), Verizon's Petition would still have to be rejected because it fails to satisfy the requirements of sections 10(a)(1) and 10(a)(2).

III. FORBEARANCE OF *COMPUTER INQUIRY* AND TITLE II IS CONTRARY TO THE PUBLIC INTEREST

As demonstrated above, grant of Verizon's Petition will harm not only non-affiliated ISPs, which will in the end harm consumers by depriving them the range of choice of ISPs that they have available today. Consumers will suffer harm in other ways as well. Noticeably absent from Verizon's Petition is a discussion of how universal service would be affected if Verizon's Petition were to be granted.[28]

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[26] Petition at 16.

[27] *CTIA v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

[28] In footnote 51, Verizon states that the FCC should forbear from applying the cost allocation rules set forth in section 64.900 of the Commission's Rules. 47 C.F.R. § 64.900. Other than to refer to an external document, Verizon did not attempt to demonstrate that forbearance from the cost allocation rules satisfies the requirements in section 10. As a result, Verizon's request should be summarily denied.

In the *Broadband Framework NPRM*,[29] proceeding regarding the regulatory status of broadband services, the Commission declared that it was not changing the mandatory obligations of telecommunications carriers to continue contributing to universal service based on their provision of broadband services to affiliated or unaffiliated ISPs or end users. The Commission declared that, in order to avoid disruption to universal service funding while the proceeding was pending, it required all carriers to make universal service contributions in the same manner as currently required. The Commission found that it was consistent with the public interest to maintain the status quo regarding universal service contributions.[30] Verizon's request for forbearance is an effort to force the Commission's hand to exempt Verizon from paying into the universal service fund before the Commission has fully vetted the issues surrounding the appropriate universal service contribution obligations for wireline broadband services. Among other things, grant of Verizon's Petition would apparently further reduce the already-declining universal service contribution base and would shift contribution obligations for other services.

[29] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Review – Review of Computer III and ONA Safeguards and Requirements*, 17 FCC Rcd 3019, ¶ 73. (2002).

[30] *Id*.

CONCLUSION

For the foregoing reasons, the Commission should deny Verizon's Petition.

Respectfully submitted,

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